# STATE OF MICHIGAN

# COURT OF APPEALS

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| ANNA LAVIGNE, individually and d/b/a CARLETON NURSERY CO., | UNPUBLISHED June 28, 2002 |
| Plaintiff-Appellee, | |
| v | No. 224872 Monroe Circuit Court |
| CSX TRANSPORTATION, INC., | LC No. 99-009112-CZ |
| Defendant-Appellant. | |

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Following a bench trial, the trial court granted plaintiff an easement by necessity over defendant's tracks for ingress and egress to her residential and business property. Defendant has not appealed that determination.[1] The trial court also enjoined defendant's trains from "unreasonably preventing plaintiffs from using the railroad crossing access for ingress and egress to their property," and ordered that defendant direct trains using the northbound tracks at issue to move its trains up so as not to block plaintiff's crossing, and cut trains that will block access for more than forty-five minutes. Defendant appeals, arguing that the injunction is preempted by federal law and the Commerce Clause. We conclude that the relief ordered is not preempted, and affirm.

I

Plaintiff Anna LaVigne owns and resides on a 45-50 acre parcel of property she and her now-deceased husband purchased by land contract in 1952, at 11529 Jones Road, Monroe County. Members of the LaVigne family have operated Carleton Nursery on the Jones Road property since that time. Predecessor owners of the property also operated a nursery, dating back to the turn of the century. In addition to plaintiff's residence and Carleton Nursery, plaintiff's son, Calvin LaVigne, has a home on the Jones Road property. Plaintiff, who at trial was seventy-five years old and in poor health, owned and operated the nursery from 1952 until approximately 1994, when Calvin bought the business. Calvin and a son-in-law of plaintiff's

[1] Although defendant's claim of appeal mentioned both the order for injunction and the order for ingress/egress easement, defendant has not briefed or listed in the statement of questions presented any challenge to the easement order. That issue is thus not before us.

now run the nursery, and in recent years have expanded the landscaping side of the business. They employ five persons on the average, who transport equipment for jobs to and from the LaVigne property, among other things.

The only means of ingress and egress from the LaVigne property/Carleton Nursery is by the LaVigne's private driveway, which crosses two sets of CSX north-south railroad tracks that are parallel to, and just to the east of, Jones Road. Jones Road is a two-lane road. The two sets of tracks, called 1 Main (northbound) and 2 Main (southbound) are eight feet apart. CSX owns the tracks and the surrounding property, having obtained it from the same person who sold the LaVignes the Jones Road property in 1952, Mary Horney. Plaintiff testified that she did not know what year Horney conveyed the property to the railroad, but testified that the railroad had been there as long as she had, i.e., 1952.[2]

In downtown Carleton, apparently several miles north of plaintiff's property, there is a railroad "diamond" at which the north-south CSX tracks at issue intersect with east-west tracks on which two other railroads operate, Grand Trunk and the Indiana & Ohio. CSX dispatchers in Jacksonville, Florida control the traffic at the diamond.

It is undisputed that, for a variety of reasons, CSX trains have blocked the LaVigne driveway for decades. Until around 1996, the parties worked out the blocking problems. Around 1996, the problems worsened and, in 1999, plaintiff brought suit for injunctive relief and a declaratory judgment, alleging that defendant's train-blocking actions constituted a nuisance, and interfered with plaintiff's right of use and enjoyment of her property, that her property has been zoned agricultural since the turn of the century, and that MCL 462.323 required that a farm crossing be constructed and maintained by the railroad. Plaintiff requested that a judgment enter declaring her rights to ingress and egress under MCL 462.323, and that the court enjoin defendant from obstructing entrance to her property for unreasonably long periods.

At the bench trial, plaintiff testified that she kept track of the dates and times CSX trains blocked access to her property. For example, in September 1999 CSX trains blocked plaintiff's driveway fifteen times. Plaintiff's logs were admitted at trial, and her testimony was unrefuted. Plaintiff testified that her husband was very ill the last years of his life, and that several times, CSX trains blocked access to her property when he needed emergency care. Plaintiff testified that she has several serious medical conditions as well, and had been hospitalized a number of times, as recently as in the months before trial. Calvin testified that he had had open heart surgery four years before, and had a mild heart attack a month before trial. Plaintiff also testified that in addition to blocking access by emergency vehicles, the stopped trains are dangerous to her and to Carleton Nursery's employees because their vision can be obstructed.

Plaintiff and Calvin both testified that when they complained in recent years to defendant that their driveway was blocked, sometimes CSX employees would cut the train, sometimes they moved the train up, and sometimes they refused to cut the train.

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[2] The court inquired of counsel whether either knew the date the railroad purchased the property, but neither did.

A neighbor of plaintiff's, Wendy Meyer, testified that she lived directly across from the LaVignes on Jones Road, to plaintiff's east, for about ten years, and that the railroad tracks separated the LaVigne property from hers. Meyer testified that trains blocking the LaVigne driveway were a common occurrence, that the LaVigne driveway was in direct view from her house, and that she saw the LaVignes climbing over railcars to get in and out of their property on a regular basis. Meyer testified that the train blockings upset plaintiff very much.

Calvin LaVigne testified that he lived on the property, at 11521 Jones Road, in a home he built about twenty-two years ago. He testified that his nursery business had lost money because of the train blockings, because the blockings prevented his five employees from transporting equipment and getting to landscaping and other jobs, and because he had to pay his employees while they waited on the other side of the tracks. Calvin testified that there were times when the blockings were less than one railcar length but, more frequently, more cars were involved. He testified that there have been times when the train had been broken apart to allow crossing, but that there had been more refusals than cuttings. He testified that the past two years had been the worst in terms of trains blocking the LaVigne driveway.[3]

Defendant called one witness, James Himes, a CSX senior road foreman. Himes testified that his responsibilities included evaluating trains and how they operate; evaluating engineers and how they operate a train; rules compliance; giving safety classes, and operating rules tests. Himes' territory included Toledo, all of Michigan, and western Canada. Himes testified that he first heard of the LaVigne property crossing around 1970, and that he had operated trains over that crossing, between Toledo and Detroit and Flint:

> *Q*. I want to ask you a little different question now. If a train has to stop and has to block in this case Mrs. LaVigne's driveway are there options that that train crew might have to free up that crossing?
>
> *A*. Yes sir, there is.
>
> *Q*. What are those options?
>
> *A*. We could – we could – when we – if a train pulls up there and is gonna sit there, we could have an option of calling a cab. We call –

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[3] Defendant moved for a directed verdict at the close of plaintiff's proofs, on the ground that plaintiff was not the real party in interest since she no longer owned Carleton Nursery, and that all economic damage testimony should be stricken. Plaintiff's counsel agreed to the striking of the testimony regarding economic damages, stating that "that should be left for a separate lawsuit by Mr. LaVigne and the L.L.C. if in fact they have sustained losses or damages as a result of the business operation." The trial court granted defendant's motion for directed verdict on the damage issue, and otherwise denied the motion.

*Q.* What do you mean by cab?

*A.* We call it a PTI cab. It could be one of our cabs that we have a contract with that come out [sic] and take the conductor from the head-end back to the crossing to cut it. He will have to back the train up a little bit, probably 3 or 4 car lengths, and cut this crossing and pull the train ahead.

*Q.* Why does he need to back it up?

*A.* Because he's probably within 2 car lengths of the signal. These trains that run along here, each of 'em's got the long cars. I think you have seen our tri-level cars. That's got a foot of slack in each car. He could be sitting here at this crossing here two car lengths from the signal, he could pull up there and not even move this rear-end, because each car has got about a foot of slack that we have in there, so when the slack comes in it doesn't just slam against the cars and hurt the merchandise. So we allow so much slack in each car.

* * *

So he has to back the train up with a man at the rear end. He can't back it up upon himself in case there's pedestrians or people back anyplace. It's not here, it's anyplace. We do not back the train up unless somebody's protecting us in the back.

*Q.* Again, is that a law?

*A.* That is the law, yes sir.

*Q.* Okay, so you have to have a crew member at the rear of the train before you can begin to back it up?

*A.* That is correct.

*Q.* And then they can back it up and then what --

*A.* And then cut the crossing and then move ahead again, and then when they get it together, which I mean make the steel joints of the train so they can leave town, a man has to make the steel joints, get the air. He either has to get a ride up to the head-end or walk to the head-end.

At this case here at Carleton we would try to call a cab because our crews from the place that he stops up here, the point at the signal where it's red, till this private crossing it's over a mile.

There is two ways of getting back there when a man has to walk. He has to walk Jones Street, which is a dirt road with school buses and people driving vehicles, and it's a dirt, unlited [sic] road – unlit road. Or he can walk number 2 main back to this crossing.

Now you have to remember when we put a man on a live track, which we call this a live track, a train can run this anytime he wants to up into a point.

So we prefer a man not to ride – or walk on a live track because during certain times a train could sneak up on him and run over this guy.

If these two –

*Q*. Couldn't he just step off the side of the track?

*A*. No sir, because there's not enough room in-between these tracks and this track to step. If there's cars in this pass he can't get over because there's cars here. There's no place for him to go. There's cars in this pass. There's no place for this man to walk when he's walking back this way.

So if there's a train coming this way or this way, there's no place for this man to go on a live track, except lay down on the ground and let the train go by him. So we do not want for his safety and all the – and the safety of the other train, a man to walk this live track.

The only possibility he could do is walk down the road, their crossing. There's a ditch on both sides. If there's a car coming in both directions, he don't have [sic] a place to go but in the ditch to be out of the way.

*Q*. So then we have the crossing cut, the engine let's say gets a clear signal, and they're now ready to move forward?

*A*. Okay, if he gets the signal and ready to move north, he will tie the crossing up, meaning the steel joint and the air hose. He either gets a ride up to the head-end or tries to walk up to the head end.

On a snowy day or even a normal day, it's gonna take – all depends on how fast the guys walks [sic] – a mile to the head-end of the train.

If he has to walk into the bricks and stones, which is our ballast, it takes him quite awhile.

*Q*. If a train crew were instructed to cut the crossing, he immediately went back to cut the crossing, and assume that as soon as they had the crossing cut and everything was set, they got the signal up so they immediately connected again and then got back on the engine, how long would it take to go through that entire cycle, normally?

*A*. Normally, like I say, it all depends on how much a guy – how fast a guy can walk. I would say it's gonna take him at least 30 minutes to do this.

Now if this rear-end has been off air for two hours, then he has to give the whole rear-end a complete air test again, that's an F.R.A. law. Any train that's been off air for two hours or longer that's sitting' back here, he has to

give that another air test. So he'll have to walk back there, make sure the air's coming up, and this crossing will be blocked because you have to pump air from the engines back to the last car. So he has to get this together, walk back, make sure he's got air, then walk to the head end again.

THE COURT: You're talking about reconnecting?

THE WITNESS: Yes sir, I am. Yes, sir. That's the only way we can give an air test is pumping air from our locomotives to the last of the car.

Himes testified that if a CSX train is blocking the LaVigne driveway by only one or two train cars, the train can call the Jacksonville dispatcher by cell phone and/or radio and, if given the okay, can pull up to the signal, thus unblocking the LaVigne driveway. Himes estimated that getting through to the dispatcher would take about twenty minutes. However, soon after, he testified that the train would not need to go through the dispatcher in order to move up to the signal and unblock the LaVigne driveway of one or two railcars.

Himes also testified that if five or six railcars are blocking the LaVigne driveway, the train can be cut without getting dispatcher permission. Himes testified that sometimes the train will know how long it will be stopped, and other times it will not know.

[HIMES:] We have rules where any time you stop a train you contact the dispatcher and find out how long you're gonna be there or tell them the reason that you're stopped.

THE COURT: Okay. So theoretically every time they stop, they should have a rough idea if it's gonna be very long?

THE WITNESS [HIMES]: That is correct, yes sir.

* * *

BY MR. MEEKS:

*Q.* If the train crew calls the Jacksonville dispatcher after they have stopped, are there times when the Jacksonville dispatcher won't know immediately how long they will have to be stopped?

*A.* There is times [sic] that our Jacksonville dispatcher will not know how long he's gonna be stopped there, only because he doesn't know how the work is progressing up to New Boston. There's trains [sic] ahead, so if it's gonna take this train ahead of this guy to stop here a little bit longer, he can't tell him the exact minute when this northbound is gonna move again, or southbound. That is true.

*Q.* When the Jacksonville dispatcher notifies the train crew how long it's going to be before they're able to move, is it up to the train crew then to decide the best way to act in clearing the crossing?

*A.* That is correct.

*Q.* What are the options available – I think we talked about cutting the crossing – if there isn't enough room to pull the train forward, what other options does the train crew have?

*A.* To cut this private crossing – or to cut any crossing, if there's not enough room on the head-end he's gonna have to send a man back to the rear end to protect it. He's gonna have to shove back so many car lengths to cut this crossing.

*Q.* I'm asking besides cutting the crossing, is there any other option that the train crew has?

*A.* No, sir.

*Q.* So they either have to cut the crossing or they have to have enough room to pull ahead?

*A.* That is correct.

*Q.* They have no other options?

*A.* Not that train crew, no sir.

* * *

THE COURT: And they would have a general idea about – if they're stopped in Carleton and they got a mile train, that they're gonna be blocking anybody back behind them. They should know that, right?

THE WITNESS: Yes, sir.

THE COURT: Okay, thank you. I'm sorry, go ahead.

BY MR. MEEKS:

*Q.* Have you had any personal contact with Mrs. LaVigne?

*A.* Yes, I have.

*Q.* When was that?

*A.* It's been numerous times on our telephone when I working [sic] as an SDO, which means a train dispatcher out of our Leban [sic?] office. Miss LaVigne would call – Miss LaVigne would call our office and say that there was a train blocking, when will the train be gone. I would call the chief dispatcher, which is over our dispatchers, and ask 'em what's going on at Carleton, and he

would tell me there's either a train ahead, or whatever's going on, he'll let the crew know what's going on down there.

On cross-examination, Himes testified that a train will learn whether it has to stop at the diamond at Carleton at a signal that is one mile away from the home signal at Carleton, which is at Main Street in Carleton. The train will learn if other train traffic is coming on an opposing track by a red signal at the home signal at Carleton, after it crosses the LaVigne private crossing.

*A.* When he comes around the bend coming out of Monroe he'll have this signal telling him that this signal may be stopped. It'll be other than clear. When he gets up over Mrs. LaVigne's crossing they'll be a signal here. If it's clear he's going through Carleton. If it's approach, he may stop at Carleton. It does not tell him he is definitely going to stop. It means to start slowing down through the F.R.A. rules that we have to give him two signals in advance of this one that tell an engineer to slow your train down.

Himes testified that the crossings to the south of the LaVigne crossing are Main Street, then Sigler Road, then Laboe. Himes testified that as a train approaches Sigler Road from the south it will get either a red, yellow, or green signal, yellow meaning it may have to stop and green meaning it is clear to go through the particular signal that it will reach next.

Himes testified that most of the trains are about one mile long and have a crew of two; an engineer and a conductor, both in the engine. He clarified that a CSX rule, not a law, prohibits trains from backing up without a person at the back. Himes testified that the most time-consuming thing in terms of breaking a train around the LaVigne crossing is getting a man from the engine back to the crossing and back again, that 95% of the time the man walks the length of the train. When asked how often he thought the LaVigne crossing is blocked for more than fifteen minutes, Himes responded "I couldn't tell you that." He testified that most of the blockings of the LaVigne crossing of significant length are from trains stationed ahead working in New Boston, and that that could explain blockings of one or two hours.

*Q.* That problem I assume the engineer or the dispatcher in Florida or both are aware of well before they reach the LaVigne crossing?

*A.* Not all the time, no sir.

*Q.* They could be, couldn't they?

*A.* They could be, but they're not aware of all the time, no sir, it's two different dispatchers.

*Q.* So it's just a matter of dialing a different number?

*A.* That is correct.

*Q.* Okay, and if that were the case, the train could be told, we've got a New Boston hang up, stop at Sigler Road?

*A.* If there was a New Boston hang up, like I told you before, if he stops at Sigler if there's other trains behind him, we'd have the whole chalant (sic) back through this area.

* * *

*Q.* Now the New Boston problem that they know about, if they can't stop at Sigler Road they certainly could drop their man off at the crossing before they got here, couldn't they?

*A.* Yes sir, they could.

* * *

They will do it if they know they ain't gonna be there a long time to cut the crossing, yes sir, they will do that.

*Q.* Every time?

*A.* Not every time. A majority of the time, yes sir.

Plaintiff re-called Calvin LaVigne on rebuttal. Calvin testified that about one-third of the blockings of the LaVigne crossing are one or two railcar blockings. He testified that in those situations, he has walked along the tracks with no problem and asked the train to move up to the light, and that sometimes they were rude and sometimes they said they could not until they got permission.

The court read its opinion from the bench:

THE COURT: All right, first of all the Court would indicate I've heard the testimony and will render a decision at this time and make certain basic findings of fact.

I would note first of all unfortunately **there's no easy resolution of this situation because on one hand you have the railroad, their right to run a railroad pursuant to federal regulations and law, and you have a private citizen whose rights to the use of her property are being curtailed.**

**The first issue is to decide whether the plaintiff has a right to ingress and egress to her property over the railroad property, and Mr. Dulany did correctly argue the elements relative to an implied easement of necessity.**

One of the factors to consider is whether the properties involved the dominant and subservient estates came from the same grantor and were part of the same parcel at one time, and of course they were here from the testimony. There's nothing to the contrary.

The purported easement has to be apparent, that is clearly capable of being seen. Obviously this – it's –nobody's even disputing that I don't think.

The easement must be continuous without a break in regular usage. This goes back, well 47 years that the – I believe it was 47, that the LaVignes have been using it, and it was before then. It's uncertain how far back it goes, but many, many years.

There was testimony that this house is 150 years old. There had to be access to the house. Now whether that was used for access way back then I don't – nobody really knows. There's no testimony to that effect.

**The necessity to use and enjoy the property and the necessity for the easement, there's no other logical access to this property**. The other property owners – there apparently was discussion to try to work something out with them. That was not – did not come to fruition.

* * *

**So clearly this Court finds that there is an implied easement by necessity for ingress and egress to the property. So that's the first issue.**

* * *

**The next issue deals with the injunction, the request for injunction. The Court certainly cannot enjoin the railroad from conducting its business. It's against public policy, it's against federal law, and it's certainly not in the public interest.**

Federal law generally governs the rules and regulations and so on involving railroads, however [,] **the Court finds that it can issue orders relative to railroads as long as it does not interfere with federal laws and regulations. Otherwise the railroad – or railroads in general could literally, and in this case, could literally block the plaintiff's access forever and claim federal – now that's taking it to an extreme, but certainly they could do that and claim federal preemption.**

Now that's I can't believe that that's the law, and I don't find that it is.

**Now I can't enjoin them from doing things that federal law says they can or have to do, of course not, but at the same time there are certain things that I believe that the railroad can be ordered to do under federal law, as long as it doesn't conflict with their – I mean under state law, as long as it doesn't conflict with their – with federal law and their requirements under federal law.**

**The defendant railroad cannot unreasonably prevent plaintiff from using her easement, that is from having access to her property.**

**The question is, what is reasonable or unreasonable? And boy, that's a hard question. I have to consider not only the business being operated on the**

**plaintiff's property, but just as importantly, maybe more importantly, the safety issues such as an ambulance, fire department access, things like that. But also I have to consider what can the railroad do to prevent or reduce its infringement on plaintiff's easement and still operate a railroad within its legal requirements and within the public interest.**

The Court – and in doing that the Court is making the following ruling:

**The railroad is ordered to pull the train up to the signal light that was testified to by Mr. Himes, whenever that will prevent blocking the plaintiff's easement.**

**Now he indicated that they do that. Well, there's been testimony that they may not do that, and so they are ordered to do that.**

*** * ***

**If it's not feasible, such as if the train's too long, there's too many cars hanging over the back, where pulling it up to that light still is gonna cause the train to block the crossing, then the railroad is ordered to unhook cars so as to not block plaintiff's easement, or take any other means at its disposal if it comes up with any other options.**

So I'm not preventing them – if they – they may come up with some other ideas that will clear the crossing without unhooking cars and that's fine if they can do that. I'm not concerned about how they do it, I'm more concerned about that they do it. **And of course the two options I've indicated here are options that were testified to by Mr. Himes that are feasible and available to the railroad.**

**The Court – the next thing is probably the most difficult, and I'm basing this on Mr. Himes' . . . testimony, and the other testimony that was presented here, but primarily on this testimony, and in no case may the railroad block the plaintiff's easement for more than 45 minutes.**

**Now an exception of course is mechanical breakdown, accidents, things like that that are beyond their control.**

**I do not find beyond their control the fact that there's a train up in the Boston yard and so they got to stop. That's beyond their control if they've got to stop but doing something to allow her access to her property is within their control. But if the train breaks down, they can't move it, they can't move it. Or if there's an accident where there's a – where they – like a car is on the tracks or something and they can't – or a derailment or something, obviously they can't do that.**

* * *

> **But 45 minutes is feasible. They can unhook a train in 45 minutes from his own testimony. That's the long way. That's if they don't drop somebody off. That's if they got to walk back there and unhook it. So that seems more than reasonable.** [Emphasis added.]

The court's Order for Injunction stated that defendant is:

- enjoined from unreasonably preventing plaintiffs from using the railroad crossing access for ingress and egress to their property;

- that "defendant shall direct all trains under their control using the Northbound CSX tracks to move their trains up to the 'ABS' signal at the Carleton, Michigan Diamond whenever it will prevent blocking of plaintiff's crossing;"

and ordered that "plaintiff's crossing shall not be blocked for more than 45 minutes unless said blocking is not in the control of defendant. In the event the crossing is to be blocked in excess of 45 minutes defendant shall 'break' the train (unhook cars) as necessary or take whatever other means are possible to clear plaintiff's crossing."

II

Determinations of preemption involve statutory interpretation and are reviewed de novo. *Konynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). "Equitable issues are reviewed de novo, although the findings of fact supporting the decision are reviewed for clear error." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999). "However, '[t]he granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case.'" *Id.*, quoting *Holly Twp v Dep't of Natural Resources*, 440 Mich 891; 487 NW2d 753 (1992). "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Nicholas v Meridian Twp Bd*, 239 Mich App 525, 533-534; 609 NW2d 574 (2000), citing *Wilkins v Gagliardi*, 219 Mich App 260, 276; 556 NW2d 171 (1996).

A

The Supremacy Clause of the United States Constitution[4] "provides Congress with the power to pre-empt state law." *CSX Transportation, Inc v Plymouth* (*Plymouth I*), 86 F3d 626, 627 (CA 6, 1996), quoting *Louisiana Pub Serv Comm'n v FCC*, 476 US 355, 368-369; 106 S Ct 1890; 90 L Ed 2d 369 (1986). The Supremacy Clause preempts state law in three circumstances. *CSX Transportation, Inc v Plymouth (Plymouth II)*, 92 F Supp2d 643 (ED MI, 2000), aff'd 283 F3d 812 (CA 6, 2002), citing *English v General Electric Co*, 496 US 72, 78; 110 S Ct 2270; 110 L Ed 2d 65 (1990). First, "express preemption" occurs where "Congress explicitly defines

[4] The Supremacy Clause, US Const, Art VI, cl 2, provides that the Constitution "and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding."

the extent to which its pronouncements preempt state law." *Plymouth II, supra.* Congressional intent controls. Second, "implied" or "field preemption" occurs where "absent explicit direction from Congress, state law is preempted where it 'regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.'" *Id.,* quoting *English, supra* at 79. Such a congressional intent may be "inferred from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where a congressional Act "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Plymouth II, supra,* quoting *Rice v Santa Fe Elevator Corp,* 331 US 218, 230; 67 S Ct 1146; 91 L Ed 1447 (1947). Third, "conflict preemption" occurs where a state law is preempted "to the extent that it actually conflicts with federal law." *Plymouth II, quoting English, supra* at 79. A state law is preempted "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English, supra* at 79.

"An assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v Locke,* 529 US 89; 120 S Ct 1135, 1147; 146 L Ed 2d 69 (2000). Regarding the nation's rail system, "[b]oth Congress and the courts have traditionally recognized a need to regulate railroad operations at a national level." *Plymouth II, supra* at 647.

**Federal Railway Safety Act (FRSA)**

The Federal Railway Safety Act (FRSA), 49 USC § 20101 *et seq.*, was enacted in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." The FRSA provides that the Secretary of Transportation "as necessary, shall prescribe regulations and issue orders for every area of railroad safety." 49 USC 20103. The FRSA also provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. **A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –**
>
> **(1) is necessary to eliminate or reduce an essentially local safety hazard;**
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce. [49 USC 20106. Emphasis added.]

Defendant argues that to comply with the injunction it must either shorten its trains, so that they do not block the LaVigne crossing, or cut its trains to free up the crossing.

Plaintiff contends that because the injunction's rationale was the health, safety, and welfare of those who live and work on plaintiff's property, and it narrowly relates to a group of Michigan citizens who would be deprived of access to emergency vehicles if trains are permitted to unreasonably block the crossing, it does not "relate to railroad safety" and is not preempted by the FRSA. Plaintiff contends that the argument cannot be legitimately made that the injunction will affect the health of railroad workers by causing trains to speed up because it pertains only to trains that 1) **are stopped**,[5] 2) **cannot be pulled up to the signal light,** and 3) **are going to block the crossing for more than 45 minutes.** Plaintiff argues that because the injunction applies only to stopped trains, defendant's argument that speed or length must be altered to comply with the injunction is irrelevant.

Defendant maintains that the City of Plymouth in *Plymouth I, supra,* "was preempted from regulating the exact activity that the trial court is regulating here." We conclude that *Plymouth I, supra,* is distinguishable. There, the court struck down the City of Plymouth's ordinance that prohibited trains from obstructing "free passage of any street . . . for longer than five (5) minutes" and required five minutes between obstructions. CSXT had sought a declaration that the ordinance was unconstitutional as applied and a permanent injunction against its enforcement. 86 F3d 627. The district court granted summary judgment for the defendant, and the United States Court of Appeals for the Sixth Circuit affirmed, noting:

> The FRSA preempts *municipal* "laws, regulations, orders, and standards *related to* railroad safety," 49 U.S.C. § 20106 (emphasis added). A federal statute that expressly calls for preemption of matters "relating to" the subject matter of that statute, preempts "actions having a connection with or reference to" that subject matter. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992). Thus, in determining whether challenged "laws, regulations, or orders relate[] to railroad safety," 49 U.S.C. § 20106, this court must determine whether there is the requisite "connection with or reference to" railroad safety. *Morales,* 504 U.S. at 384, 112 S.Ct. at 2037; *see also American Airlines, Inc. v. Wolens,* __ U.S. 715 (1995) (applying this definition to the phrase "relates to").
>
> The Plymouth ordinance does not, on its face, make "reference to" railroad safety. *Morales,* 504 U.S. at 384, 112 S.Ct. at 2037. Plymouth contends that this ordinance is not preempted because it was enacted to "promote the general welfare of its residents, and was not directed towards and does not regulate any aspect of 'railroad safety.'" Neither that purpose nor the lack of a "reference to"

[5] Plaintiff notes that although the order for injunction does not expressly state that it applies only to stopped trains, it is implied in the trial court's decision.

railroad safety precludes a finding that the ordinance is "related to" railroad safety because the ordinance has a "connection with" railroad safety.

. . . . In determining whether the Plymouth ordinance has "a connection with" and is thus related to railroad safety, this court must necessarily look at the terms of the ordinance and what the ordinance requires in terms of compliance. As noted by the district court, "[t]he Plymouth ordinance does not, nor cannot mandate the manner in which a carrier must comply." It is on the basis of potential safety aspects of compliance with the ordinance that the challenged ordinance relates to railroad safety. Taking the evidence in the light most favorable to Plymouth, it appears that compliance with the challenged ordinance would require either shorter or faster trains.

Requiring trains to be shorter would necessarily require CSXT to use more trains. The district court, quoting an April 1989 Report of Secretary of Transportation to the United States Congress, noted that " '[c]hanges in highway traffic volumes and total trains per day affect accident rates more than other factors.'" Plymouth presents no evidence contrary to this conclusion. As the evidence indicates that accident rates would be affected by compliance in this manner and accident rates unquestionably relate to railroad safety, the ordinance is "related to railroad safety." This is true even though this relationship is from an "effect [that] is only indirect." *Morales*, 504 U.S. at 386, 112 S.Ct. at 2038.

Taking the evidence in any light, faster trains, the only logical compliance alternative to shorter trains, also have a connection with and are thus related to railroad safety. The Secretary of Transportation's report indicates the obvious: higher average train speeds increase the number of "fatal accidents, as a proportion of all accidents." This is true whether these trains would be made faster by existing engine power, an extra "pusher engine," or altered tracks.

. . . . In light of CSXT's entitlement to judgment based on FRSA preemption, we need not rule on CSXT's Commerce Clause and discriminatory taxation claims. [*Plymouth I, supra* at 627-630.[6]]

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[6] *Plymouth II*, a decision issued after the instant bench trial, is also distinguishable. In that case, the court held Michigan's statute limiting the amount of time a train can block a grade crossing to five minutes, MCL 462.391, preempted by the FRSA and the ICCTA, and violative of the Commerce Clause. CSXT argued in *Plymouth II* that the state law required it to run either shorter or faster trains. 92 F Supp 2d at 651. The court noted regarding whether the FRSA preempted the statute:

> . . . . Defendants would have the Court find that the statute's safety goal is to address highway safety. They then contend that none of the federal regulations address those same safety concerns, and that therefore, the [FRSA] savings clause saves the law from preemption.
>
> * * *

(continued…)

Assuming for purposes of argument that the injunction at issue is a law, regulation or order "related to railroad safety," we conclude that it falls under one of the FRSA's exceptions (savings clauses), 49 USC 20106. Trial testimony supported that the blockings of plaintiff's crossing have created a "local safety hazard," by preventing emergency vehicles from gaining access to the property, and by causing the LaVigne family and employees of Carleton Nursery to have to cross the railroad tracks on foot and climb through the space between the train cars, and by obstructing vision. The injunction is not "incompatible with a law, regulation, or order of the United States government" since there are no federal laws or regulations that address trains blocking private crossings of citizens, and the injunction does not conflict with other regulations.

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(…continued)

> . . . the Court finds that federal regulations regarding speed "cover the subject matter" of the state requirement. The state requirement has the effect of actually regulating speed, length, and the performance of air brake testing. The FRA regulations substantially subsume these areas. The federal regulations amply cover the issue of how fast or how slow a train can proceed through a grade crossing, based on the selected class of track. 49 CFR § 213.9, 213.307. The regulations also set maximum train speed limits for different track curvatures and elevations. 49 CFR § 213.57. The federal regulations also limit the class of track which can be laid down at a grade crossing. 49 CFR § 213.347. Federal preemption of speed alone invalidates this statute. As noted, mathematically, speed and length cannot be separated. Thus, because the state statute has the effect of regulating speed, and federal regulation of speed covers the subject matter of the state requirement, a separate discussion of whether length is preempted is not necessary. . . . Finally, the state statute has been shown to bear upon the performance of federal air brake testing, an area over which the Secretary has issued explicit regulations. 49 CFR § 232.12-232.13. Accordingly, the state statute cannot survive under the first savings clause.
>
> 2. Second Savings Clause
>
> Nor is the state statute sheltered from preemption under the second savings clause. That clause provides:
>
> > A State may adopt or continue in force an additional or more stringent law, regulation or order related to railroad safety when the law, regulation, or order –(1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.
> >
> > 49 U.S.C. § 20106.
>
> The state statute does not fall within this exception. Where a state law has general, state-wide applicability, it is not considered to eliminate or reduce an essentially local safety hazard . . . . [92 F Supp 2d 651-658.]

Further, the injunction does not unreasonably burden interstate commerce because the injunction only limits stopped trains that unreasonably block plaintiff's crossing, as discussed *infra*.

## ICCTA

The Interstate Commerce Commission Termination Act, (ICCTA), 49 USC 10101 *et seq.*, was enacted in 1995 to substantially deregulate the railroad and other surface transportation industries. It abolished the Interstate Commerce Commission and created the Surface Transportation Board. The ICCTA's express preemption provision provides:

> Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. [49 USC § 10501(b).]

Defendant argues that "to the extent the trial court's Order is incompatible with, or attempts to regulate, a railroad's performance of routine interstate rail operations, it is . . . expressly preempted by the ICCTA," quoting from legislative history:

> i. This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect **the direct and complete pre-emption of State economic regulation of railroads.** The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy **of occupying the entire field of economic regulation of the interstate rail transportation system.** [quoting H.R. Rep. No. 104-311, at 95-96. Emphasis added.]

The *Plymouth II, supra*, court addressed the ICCTA preemption issue as follows:

> The Court recognizes the persuasive force of the State's argument that apart from having the effect of regulating speed, length, and air brake testing, that the statute could also be fairly characterized as requiring the railroad to make substantial capital improvements to upgrade its class of track or relocate its yards. Viewed in this way, the law does not affect speed, length, or air brake tests, but rather requires the railroad to undergo substantial renovations at the state's command. See *Norfolk & W. Ry. Co. v. Oregon,* 149 F.3d 1184, 1998 WL 381510 (6th Cir. 1998) (unpublished) (distinguishing *Plymouth I* and remanding, noting that an Ohio ordinance which limits the amount of time a train can block a crossing to five minutes may not be preempted under FRSA where there may be a way to comply that does not impact railroad safety). To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, the Court finds that the law is preempted by the [ICCTA]. [*Plymouth II,* 92 F Supp 2d at 658-659.]

Defendant does not argue, and there was no testimony to the effect that, capital expenditures could or would result from the trial court's injunction. Rather, defendant argues

that to the extent the injunction attempts to regulate a railroad's performance of routine interstate rail operations it is preempted under the ICCTA.

We conclude that the trial court's injunction is not an economic regulation, nor has it been shown that it would have an economic effect. It is not addressed to infrastructure and there has been no showing that infrastructure expenditures would be needed.[7]

## THE COMMERCE CLAUSE

Defendant's Commerce Clause arguments are reiterations of previous arguments, specifically, that in order for defendant to comply with the trial court's injunction it would either have to shorten its trains or "cut" its trains. Defendant properly argues that the Supreme Court in *Southern Pacific Co v Arizona*, 325 US 761; 65 S Ct 1515; 89 L Ed 1915 (1945), invalidated an Arizona statute that restricted interstate train lengths to seventy freight cars or fourteen passenger cars, on the basis that it adversely affected transportation efficiency and economy, and that in *Plymouth II, supra,* the court found Michigan's statute limiting train blockings of vehicular traffic to five minutes preempted and violative of the Commerce Clause. The *Plymouth II* court noted in regard to the Commerce Clause:

> . . . a state law must be sustained if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 25 L.Ed 2d 174, 90 S.Ct. 844 (1970).
>
> Despite the balancing test which the Supreme Court reiterated in *Pike,* in no event can a state law directly regulate interstate commerce. . . .
>
> The state statute at issue here directly regulates trains on their tracks. . . .
>
> * * *

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[7] In any event, the cases defendant cites are factually distinguishable, in that none involved blockings of sole routes of access to private/business/farm property, and none involved a state court injunction attempting to balance those circumstances. See *City of Auburn v United States,* 154 F3d 1025, 1030-1031 (CA 9, 1998) (ICCTA's plain language expressly preempted local environmental review process under state and local laws that localities sought to enforce during railroad's reopening of abandoned railroad line, noting "the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it."); *Soo Line RR Co v Minneapolis,* 38 F Supp 2d 1096 (D Minn, 1998) (ICCTA expressly preempts local regulations barring demolition of buildings on railroad property that railroad wanted to demolish in redevelopment of rail yard); *Burlington Northern Santa Fe Corp v Anderson,* 959 F Supp 1288 (D Mont, 1997) (ICCTA preempted, by virtue of field preemption, state law under which public service commission regulated discontinuance of railroad station agencies or depots); and *CSX Transportation, Inc v Georgia Public Service Comm'n,* 944 F Supp 1573 (ND Ga, 1996) (ICCTA expressly preempts state regulatory authority over railroad agency closings).

> . . . if every state were to enact legislation limiting the amount of time a railroad could block a crossing, a substantial burden would be placed upon interstate commerce. . . . [92 F Supp 2d 659-661.]

The injunction at issue does not affect the length or speed of defendant's trains. Complying with the court's order does not require defendant to shorten its trains or move its trains faster on its tracks. Defendant's representative testified that the two measures referred to in the order, moving the trains up, or splitting them temporarily, are feasible and were employed by defendant on a voluntary basis in the past. There is no indication that such activity will place a substantial burden on interstate commerce.

In *People v Consolidated Rail Corp,* 145 Mich App 707; 378 NW2d 581 (1985), the defendant railroad challenged Michigan's statute limiting trains from blocking vehicle crossings for more than five minutes *as applied to its operations at a curve known as the Bottsford Curve*, which was used by no railroad other than the defendant, as running afoul of the Commerce Clause. This Court held that was not tantamount to a burden on interstate commerce: "[t]he burden on interstate commerce, relegated solely to the effect on defendant's operations at one curve in a single city, is so slight that the presumption of validity is enough to sustain the statute." *Id.* at 715.[8] *Consolidated Rail* focuses on a distinction that is operative here. In the instant case, the injunction affects one single private crossing, comparable to the single curve involved in *Consolidated Rail.* Unlike *Plymouth II*, which distinguished *Consolidated Rail* on that basis, the instant case does not involve many intersections and does not involve a state statute of state-wide applicability. We conclude that the instant injunction has such a minor effect on interstate commerce that there is no unreasonable burden.

III

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[8] *Consolidated Rail,* was decided before *Plymouth II, supra*. The *Plymouth II* court acknowledged *Consolidated Rail,* but held it inapplicable:

> This Court is mindful of the fact that the Michigan Court of Appeals in *People v. Consolidated Rail Corp.*, 145 Mich. App. 707, 378 N.W.2d 581 (Mich.Ct.App. 1985), held that the state statute at issue in this case did not violate the Commerce Clause as applied to "a single curve used by a single railroad." *Id.* at 714. The Court of Appeals was "unconvinced that the Commerce Clause should be applied to such local circumstances, which have little relevance to 'the interests of the nation in an adequate, economical and efficient railway transportation service." *Id.*, (quoting *Southern Pacific*, 325 U.S. at 783-784). . . . .
>
> * * *
>
> *Consolidated Rail* is not controlling on the facts at issue here. The court in that case stressed that its analysis was based on only one curve. The instant case involves many intersections, and the statute has state-wide applicability. [92 F Supp 2d at 662-663.]

Defendant's remaining arguments are that because its activities antedated plaintiff's purchase of the Jones Road property, plaintiff cannot complain; that its "legitimate business activity" cannot be enjoined; and that the injunction grants an implausible remedy.

Plaintiff notes, and we agree, that under the circumstance that defendant is not challenging that plaintiff established an easement by necessity over defendant's railroad tracks because the LaVigne property is otherwise landlocked, i.e., not challenging the trial court's order granting plaintiff an ingress/egress easement, defendant's argument that plaintiff cannot complain of trains blocking access to her property for long periods is not well taken. Further, the remedy granted is not "implausible" because it is based on defendant's expert's testimony, including that defendant's train crews have and have had the discretion to cut trains if crossings are blocked.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper